TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1571.

LOUIS TRAGER AND EVA A. TRAGER, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

JOHN F. JENKINS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED FEBUUARY 26, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 26, 1890.

1 In the Circuit Court of the United States for the Southern District of Mississippi.

MONDAY, *November 4th*, 1889.

This, the fourth day of November, 1889, being the first Monday of said month and being the day fixed by law for the meeting of the circuit court of the United States & fifth circuit, there were present S. S. Matthews, U. S. marshal; A. M. Lea, U. S. attorney, & R. H. Winter, clerk.

By virtue of a written order from the Hon. R. A Hill, one of the judges of said court, the same was declared open, and afterwards adjourned until to-morrow at 9 o'clock.

TUESDAY, *November the 5th*, 1889.

Court met pursuant to adjournment.

Present: The Hon. R. A. Hill, judge; S. S. Matthews, U. S. marshal; Albert M. Lea, U. S. attorney, & R. H. Winter, clerk.

Be it remembered that heretofore, to wit, on the 6th day of May, 1889, Louis Trager & Eva A. Trager, defendants, filed in the office of the clerk of said U. S. circuit court a transcript of the record of a cause lately pending in the circuit court of Wilkinson county, Mississippi, in which John F. Jenkins is plaintiff & Louis Trager & Eva A. Trager are defendants; and the same with the proceedings and final judgment of said U. S. circuit court thereon are in the following words & figures, to wit:

2 JOHN F. JENKINS
vs.
LOUIS TRAGER, EVA A. TRAGER, ISAAC WOLF.

Pleas before the Hon. Ralph North, judge of the circuit court of the 6th judicial district of the State of Mississippi, sitting in & for the county of Wilkinson, at the court-house, in the town of Woodville, on the 1st Monday in January, 1889.

Be it remembered that heretofore, to wit, on the 21st day of May, 1888, came said plaintiff, by his attorney, and filed herein his certain declaration as follows, to wit:

3 *Declaration.*

Wilkinson Circuit Court. June Term, 1888.

JOHN F. JENKINS
vs.
LOUIS TRAGER *et als.*

In Circuit Court. June Term, 1888.

THE STATE OF MISSISSIPPI,
County of Wilkinson.

The plaintiff in this action, John F. Jenkins, by his attorney, demands of Louis Trager, Eva A. Trager, and Isaac Wolf, the defend-

ants therein, the possession of a tract of land, with the appurtenances, situated in said county and described as three acres in the southwest corner of section six, township 1, range 5 west, and bounded on the south by line of demarkation between the States of Mississippi & Louisiana, on the west & northwest by the Mississippi river, old bed, on the north, northeast, & east by other lands of plaintiff, and comprising storehouse, garden, stable, & lot, &c., now occupied by defendants and now called Trager's store, stable, lot, &c.; and the plaintiff says that his right to the possession of the same accrued on 1st day of October, A. D. 1880, and that the defendants wrongfully deprives *them* of the possession thereof, to his damages one hundred dollars; and the said plaintiff also demands the sum
4 of eight hundred dollars for the use and occupation of said land by the defendants from the aforesaid — to the commencement of this suit, being at the rate of one hundred dollars a year.

D. C. BRAMLETT.
Attorney for Plaintiff.

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

To the sheriff of Wilkinson county, Greeting:

We command you to summon Louis Trager, Eva A. Trager, & Isaac Wolf to appear before the circuit court of Wilkinson county, to be held at the court-house, in the town of Woodville, on the first Monday of June, 1888, to answer the complaint of John F. Jenkins, who demands of them the possession of the following tract of land, with the appurtenances, situated in the county of Wilkinson, State of Mississippi, and described as three acres in the southwest corner of section six, township 1, range 5 west, and bounded on the south by line of demarcation between the States of Mississippi & Louisiana, on the west and northwest by the Mississippi river, old bed, on the north, northeast, & east by other lands of plaintiff, and comprising storehouse, garden, stable, lot, &c., no- occupied by defendants, now lot, & called Trager's store & stable; and in
5 default of their appearing and defending this action judgment will be entered against them and they will be turned out of the possession of said lands; and have you then & there this writ with your proceedings thereon.

Issued this 21st d-y of July, 1888.

L. C. JOHNSON, *Clerk.*

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

To the sheriff of Wilkinson county, Greeting:

We command you to summon Louis Trager, Eva A. Trager, & Isaac Wolf to appear before the circuit court of Wilkinson county, to be held at the court-house, in the town of Woodville, on the 1st Monday of Jan'y, 1889, to answer the complaint of John F. Jenkins, who demands of them the possession of the following tract of

land, with the appurtenances, situated in the county of Wilkinson, State of Mississippi, and described as three acres in the southwest corner of sec. six, township 1, range 5 west, and bounded south by line of demarcation between the States of Mississippi & Louisiana, on the west & northwest by Miss. river, old bed, on north &
6 N. E. & east by other land of p'ff, and comprising storehouse, garden, stable, & lot, &c., now occupied by —; and in default of their appearing and defending this action judgment will be entered against them and they will be turned out of the possession of said lands; and have you then & there this writ, with your proceedings thereon.

Issued this 21st d-y of July, 1888.

L. C. JOHNSON, *Cl'k.*

I hereby appoint E. R. Davis my special deputy sheriff to execute & return the within process this 21st d-y of July, 1888.

F. D. LEWIS, *Sheriff.*

Ex. on Mrs. Trager 25th of Aug. Ex. on L. T. Trager Sep. 3d. Personally executed Aug. 25th, 1888, on Mrs. Eva E. Trager by handing her a true copy of within summons, & executed on Louis Trager Sept. 3d, 1888.

F. D. LEWIS, *Sheriff,*
By E. R. DAVIS, *S. D. S.*

Circuit Court. January Term, A. D. 1888.

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

JOHN F. JENKINS, P'ff, }
vs. } Plea.
LOUIS TRAGER, EVA A. TRAGER, Def't-. }

And the said Louis Trager and Eva A. Trager, by their attorney, appear and defend this action, and say they are not guilty
7 of the injury whereof the said John F. Jenkins hath complained in his declaration, nor of any part thereof, & of this they put themselves upon the country.

A. G. SHANNON,
Att'y for Defendants.

STATE OF MISSISSIPPI, }
Wilkinson County. }

Circuit Court. January Term, 1889.

JOHN F. JENKINS, P'ff, }
vs. } Petition.
LOUIS TRAGER & EVA A. TRAGER, Def't-. }

To the Honorable Ralph North, judge of said court:

The petition of defendants in the above suit, Louis Trager & Eva A. Trager, would respectfully show unto your honor that the matter in dispute in this case, wherein they are defendants and John F.

Jenkins is plaintiff, exceeds, exclusive of interest & costs, the value of two thousand dollars; that the said suit is a controversy between citizens of different States; that your petitioners are citizens & residents of Louisiana and the said plaintiff is a citizen & resident of Natchez, Mississippi, the district of the U. S. court held at Jackson, Mississippi. He herewith tendered & filed a bond in the sum of $100.00, according to law, & he prays this honorable court to accept this petition & the said bond & proceed no further with
8 said case, but that the said suit be transferred to the United States circuit court at Jackson, Mississippi, to be tried at the next term.

A. G. SHANNON,
Att'y for Def'ts,
By LOUIS TRAGER.

Sworn to & subscribed before me, the undersigned, circuit clerk, this — d-y of Nov'r, 1889.

—— ——.

Know all men by these presents that we, Louis Trager & Eva A. Trager, of Louisiana, & —— ——, of Wilkinson county, Mississippi, are held and firmly bound unto John F. Jenkins, of Natchez, Mississippi, in the penal sum of one hundred dollars; for the payment whereof, well & truly to be made, we bind ourselves, our & each of our heirs, executors, & administrators, firmly by these presents.

Signed with our hands this 7th d-y of January, A. D. 1889.

The condition of the above obligation is that whereas the above-bound Louis Trager & Eva A. Trager have herewith filed a petition praying the removal of a certain action, bearing the No. 323 in the circuit court of Wilkinson county, Mississippi, & being an action of ejectment, wherein the above John F. Jenkins is pl'ff & Louis Trager & Eva A. Trager, above bound, are defendants, to the United States circuit court at Jackson, Mississippi: Now, therefore, if said Louis Trager & Eva A. Trager shall well & truly enter in said United States circuit court, at Jackson, the first day of its next term, a copy of
9 the records in said suit and pay all costs that may be awarded by said U. S. circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, & if they shall also appear & enter special bail in said suit if special bail was originally requisite therein, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands this d-y & year above written.

LOUIS TRAGER.
EVA. A. TRAGER,
Per L. TRAGER.
JAS. D. CAGE.
SIMON BLUMENTHAL.

At the January term, 1889, the following order was made, to wit:

JOHN F. JENKINS
vs.
LOUIS TRAGER *et als.*

Ordered that this case be transferred to the United States court at Jackson, Mississippi.

STATE OF MISSISSIPPI,
Wilkinson County.

MAY 4TH, 1889.

I, K. F. Johnson, clerk of the circuit court of said county, certify that the foregoing is a true & correct copy of the judgment rendered & papers on file in the above case at the last January term of said court as the same appears from the records thereof.

[SEAL.] K. F. JOHNSON,
Circuit Clerk.

10 *Cost Bill.*

Fees not paid to officers of court:

Cl'k K. F. Johnson	4 80
Transcript	3 50
Sheriff Lewis	5 00
	$13 30

Filed May 7th, 1889.

JAS. M. McKEE,
Cl'k U. S. Cir. Ct. So. Dist. Miss.,
Per R. H. WINTER, *D. C.*

11 *Continued & Set for Hearing.*

In the Circuit Court of the United States, Southern District of Mississippi. May Term, 1889.

JOHN F. JENKINS
vs. = 3502.
LEWIS TRAGER *et al.*

MAY 7TH, 1889.

On application of defendants, plaintiff consenting thereto, it is ordered that this cause be continued to the next term of this court, and be set for trial on the first Wednesday of said term.

12 *Dismissal as to Isaac Wolf, &c.*

In the Circuit Court of the United States for the Southern District of Mississippi.

JOHN F. JENKINS
vs. 3502.
LEWIS TRAGER *et al.*

NOVEMBER 26TH, 1889.

This, day & before the trial of this cause on the issue joined, came

the plaintiff, by his attorney, and dismissed this suit as to Isaac Wolf, who has not been found in the jurisdiction of this court, and who was at the institution of this suit the tenant of the other defendants, in the possession of the tract of land in controversy and for which his landlords defend.

13 *Stipulation.*

In the Circuit Court of the United States for the Southern District of Mississippi.

JOHN F. JENKINS
vs.
LOUIS TRAGER *et al.* } 3502.

Agreed that claim for improvements, storehouse and two other buildings and a stable and shed and cistern & fences, be regarded as duly set up with the plea under the statute and as claiming a total value of $1,440, and so of taxes paid, aggregating $200.

BRAMLETT & NUGENT & McWILLIE, *For Pl'ff.*
CALHOON & GREEN, *For Def'ts.*

Filed Nov. 22d, 1889.

R. H. WINTER, *Clk.*

14 *Judgment.*

In the Circuit Court of the United States for the Southern District of Mississippi. November Term, 1889.

JOHN F. JENKINS
vs.
LEWIS TRAGER *et al.* } = 3502.

NOVEMBER 26TH, 1889.

This day came the parties, by their attorneys, and thereupon came also a jury of good and lawful men, to wit, John McGill & eleven others, who, being sworn will & truly to try the issue joined, upon their oaths say: "We, the jury, find for the plaintiff and assess the rental value of the lands & improvements at the sum of six hundred and sixty dollars, and we assess the value of the improvements at the sum of six hundred and fifty dollars, making a difference of ten dollars, due the plaintiff by the defendant; and we assess the value of the lands without the improvements at the sum of thirteen hundred and fifty dollars.

It is therefore considered by the court that the plaintiff have & recover of the defendants, Lewis Trager & Eva A. Trager, the tract of land in the declaration mentioned, situated in Wilkinson county, Mississippi, and described as three acres in the southwest corner of section six, township one west, of range five west, bounded
15 on the south by line of demarcation between the States of Mississippi & Louisiana, on the west & northwest by the Mississippi river, old bed, on the north, northeast, & east by other lands of plaintiff, and comprising the storehouse, garden, stable, & lot

now occupied by the defendants, and called the Trager store, stable, &c., and the sum of ten dollars, being the excess of rents over the value of improvements, together with the costs of this cause, to be taxed, &c.; and it is further considered by the court, & so ordered, that writs of *habere facias possessionam* and *fieri facias* herein issue according to law, &c.

16 In the Circuit Court of the United States for the Southern District of Mississippi. November Term, 1889.

JOHN F. JENKINS
vs. } 3502.
LEWIS TRAGER.

NOVEMBER 26TH, 1889.

On defendants' application it is considered that they have 90 days in which to give supersedeas bond on writ of error to Supreme Court; which bond is fixed at one thousand dollars.

17 *Writ of Possessionam.*

UNITED STATES OF AMERICA,
Southern District of Mississippi:

The President of the United States to the marshal of said district, Greeting:

Whereas on the 26th day of November, 1889, a judgment in ejectment was rendered in this court in the cause of John F. Jenkins *vs.* Louis Trager & Eva A. Trager, his wife, No. 3502, in which it is ordered that the plaintiff, John F. Jenkins, do have and recover of the defendants, Louis Trager & Eva A. Trager, the tract of land in the declaration mentioned, situated in Wilkinson county, Mississippi, and described as three acres in the southwest corner of section six, township one west, of range five west, bounded on the south by line of demarkation between the States of Mississippi & Louisiana, on the west & northwest by the Mississippi river, old bed, on the north, northeast, & east by other lands of plaintiff, and comprising the storehouse, garden, stable, & lot now occupied by the defendants & called the Trager store, stable, lot, &c.: You are therefore commanded to remove the said defendants, Louis Trager & Eva A. Trager, from the aforesaid premises, as well as all other persons who may be wrongfully therein or thereon, and to put the said John F. Jenkins, plaintiff, in full possession thereof. This you shall in nowise omit, &c.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

R. O. Edwards is hereby specially deputized to execute & return this process according to law.

S. S. MATTHEWS,
U. S. Marshal.

18 Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Jackson, Mississippi, this December 2d, 1889.

[SEAL.] R. H. WINTER, *Clerk.*

Executed by putting John F. Jenkins in possession, as writ directs, & further executed by delivering a true copy of this writ to Louis Trager, for himself & wife, on the 6th day of December, 1889.

S. S. MATTHEWS, *U. S. M.*,
By R. O. EDWARDS, *Deputy.*

19 Circuit Court United States, Southern District of Mississippi.

JOHN F. JENKINS
vs. } No. 3502.
LOUIS TRAGER & EVA A. TRAGER.

The President of the United States to the marshal of the southern district of Mississippi, Greeting:

We command you that of the goods and chattels, lands and tenements, of Louis Trager & Eva A. Trager, late of your district, you cause to be made the sum of ten dollars, which John F. Jenkins, p'ff, lately in our circuit court for the district aforesaid, hath recovered against them for his damages which he hath sustained by reason of the non-performance of their promise and assumption by the said defendants to the said plaintiff lately made, with interest on the said sum, at 6 per centum per annum, from the 26 day of November, 1889, until paid; also that — sum of three hundred and fifty-eight & $\frac{15}{100}$ dollars for costs by him about his suit in the behalf expended, whereof the said defendants are convicted, as appears to us of record, and that you have the said moneys before the judges of our said court on the first Monday of May next, to render to the said plaintiff for damages and costs aforesaid; and have then there this writ.

Witness my hand and seal of said court hereto affixed and issued this 2d day of December, 1889.

[SEAL.] R. H. WINTER, *Clerk.*

Clerk's Fees.

Issuing writ, seal, etc.	
Filing 10 papers and certificates	1 00
Orders, rules, motions	10
Continuances, bonds for costs	
Affidavits, 1 judgment	30
13 certificates to witnesses	4 55
13 to testify	1 55
Swearing witnesses, 13	1 30
1 subpœna, seal, etc.	75
Making dockets, indexes, and taxing costs	3 00
1 commission, seal, etc.	1 50
Copies of interrogatories, *habere facias*	1 75
Dismission	
Fi. fa., entry and certificates	1 75
Making record	

	17 55
Attorney's tax fee	20 00
Depositions	13 00
Witnesses	253 50
Am't p'd A. H. Foster, copy Jenkins' est. papers	16 75
Commissioner's fee	

Marshal's Fees.

Serving writ, docketing, and return, Durkins		7 00
Cop. of writ E. and R.; copy of field-notes, Colly		5 00
Summoning witnesses, court's costs in Wilkinson co		13 50
Mileage on writ	Am't p'd D. C. Muller, cl'k, p'id by p'ff	5 25
	" " K. F. Johnson, "	3 50
	" " J. M. Smylie, "	2 50
Mileage on subpœnas		
Serving interrogatories		
Mileage on same		
		358 15

20 Rec'd Dec. 2d, 1889.

S. S. MATTHEWS, *U. S. M.*

UNITED STATES OF AMERICA, *Southern District of Mississippi:*

R. O. Edwards is hereby specially deputized to execute and return this process according to law.

S. S. MATTHEWS,
U. S. Marshal.

Executed Dec. 9th by collecting *by collecting* whole am't of judgment & costs.

S. S. MATTHEWS, *U. S. M.*,
By R. O. EDWARDS, *D. U. S M.*

[Endorsed:] No. 3502. Circuit court U. S. To May term, 1890. John F. Jenkins *vs.* Louis Trager & Eva A. Trager, defendants. Wilkinson county.

Judgment	$10 00
Costs in Wilkinson Co.	13 50
Clerk	17 55
Copy Jenkins' est. papers	16 75
" field-notes	5 00
Attorney's fees	20 00
D. C. Miller, cl'k	5 25
K. F. Johnson	3 50
Depositions	13 60
J. M. Syln	2 50
Witness fees	253 50
Marshal's fees	7 00
	368 15

NUGENT & McWILLIE, *P. Q.*

21 *Writ of Error Bond.*

In the Supreme Court of the United States.

JOHN F. JINKINS
vs. } = 3502.
LOUIS TRAGER & EVA A. TRAGER.

Know all men by these presents that we, Louis Trager & Eva A. Trager, of the State of Louisiana, principals, and Edward Aaron & Simon Blumenthal, sureties, are held & firmly bound unto J. F. Jenkins, of the State of Mississippi, in the sum of one thousand dollars ($1,000.00), to be paid to the said John F. Jenkins, his executors or administrators; to which payment, well and truly to be made, we bind ourselves & each of us, jointly & severally, and our & each of our heirs, executors, & administrators, firmly by these presents.

Signed by our hands & sealed with our seals this 20th day of January, A. D. 1890.

The condition of the above obligation is such that whereas the above-named Louis Trager & Eva A. Trager have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Mississippi.

Now, therefore, the condition of this obligation is such that if the above-named Louis Trager & Eva A. Trager shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall
22 be void; otherwise to remain in full force & virtue.

LOUIS TRAGER. [SEAL.]
EVA A. TRAGER. [SEAL.]
EDWARD AARON. [SEAL.]
S. BLUMENTHAL. [SEAL.]

STATE OF MISSISSIPPI, }
County of Wilkinson. }

Personally appeared before the undersigned officer Edward Aaron & Simon Blumenthal, sureties on the foregoing bond, who, being by me first duly sworn, made oath that they are worth the sum of one thousand dollars, in visible property subject to execution at law, over and above all their exemptions & liabilities.

EDW'D AARON.
S. BLUMENTHAL.

Sworn to & subscribed before me this 20th day of January, 1890.
[SEAL.] K. F. JOHNSON, *Clerk*,
P'r W. C. MILLER, *D. C.*

I approve the foregoing bond & sureties, to operate as a supersedeas, as per agreement, this Jan'y 22d, 1890.

R. A. HILL, *Judge.*

23 UNITED STATES OF AMERICA, *ss:*

To John F. Jenkins, Greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein Louis Trager & Eva A. Trager are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Hon. Melville W. Fuller, — of the Supreme Court of the United States, this 22d day of January, in the year of our Lord one thousand eight hundred and ninety.

R. A. HILL, *Judge.*

To the marshal to execute & make due return.

[SEAL.] R. H. WINTER, *Clerk.*

I hereby appoint R. O. Edwards special deputy U. S. marshal to execute this writ according to law.

S. S. MATTHEWS,
U. S. Marshal.

24 Executed this writ by handing to W. A. Coulson, the agent of John F. Jenkins, in Wilkinson county, Mississippi, on 25th day of January, 1890, a true copy of same, John F. Jenkins not being found.

S. S. MATTHEWS,
By R. O. EDWARDS,
Special Deputy.

25 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the southern district of Mississippi, Greeting:

The cause [because] in the records & proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Louis Trager & Eva A. Trager and John F. Jenkins, *and* manifest error hath happened, to the great damage of the said Louis Trager and Eva A. Trager, as by their complaint appears, *that* being willing that the error, if any has been, should be duly corrected & full & speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly & openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, being the thirteenth day of October, A. D. 1890, to be then & there held,

that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

26 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the 22d day of January, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] R. H. WINTER, *Clerk.*

27 *Order of Restitution.*

In the Circuit Court of the United States for the Southern District of Mississippi.

JOHN F. JENKINS
vs.
LEWIS TRAGER & EVA A. TRAGER. } = 3502.

JANUARY 22D, 1890.

In this case I have approved the writ of error bond signed by the said Lewis Trager & the said Eva A. Trager, as principals, and Edward Aaron & S. Blumenthal, as sureties, and I have ordered a supersedeas on such bond: and it appearing that the clerk has issued an execution on the original judgment, and that the marshal has executed the same by putting said defendants out of possession of the property in controversy & putting the said plaintiff in possession thereof, it is now therefore ordered that the said Lewis Trager & Eva A. Trager be restored to the possession of the property involved in the controversy, and that the *status quo* before the issuance of said execution be fully restored, and that proper citation issue on the writ of error in this cause.

Done at chambers, in Oxford, Mississippi, this 22d January, A. D. 1890.

R. A. HILL, *Judge.*

28 *Writ of Restitution.*

UNITED STATES OF AMERICA, *Southern District of Mississippi:*

To the marshal of said district, Greeting:

Whereas, on the 22d day of January, 1890, the following order was made by Hon. R. A. Hill, judge, to wit:

"In the Circuit Court of the United States for the Southern District of *of* Mississippi.

JOHN F. JENKINS
vs.
LEWIS TRAGER & EVA A. TRAGER. }

In this cause I have approved the writ of error bond signed by the said Lewis Trager & the said Eva A. Trager, as principals, and Edward Aaron & S. Blumenthal, as sureties, and I have ordered a supersedeas on such bond; and it appearing that the clerk has issued

an execution on the original judgment, and that the marshal has executed the same by putting said defendants out of possession of the property in controversy and putting the said plaintiff in possession thereof, it is now therefore ordered that the said Louis Trager & Eva A. Trager be restored to the possession of the property involved in the controversy, and that the *status quo* before the issuance of said execution be fully restored, and that proper citation issue on the writ of error in this case. Done at chambers, in Oxford, Mississippi, this 22 day of January, A. D. 1890.

29 You are therefore hereby commanded to forthwith restore to the said defendants, Louis Trager & Eva A. Trager, the possession of the premises involved in said suit, and from which they were removed under writ of *habere facias possessionam*, issued from said court on 2d December, 1889, and which are described as follows, to wit: The tract of land in the declaration mentioned, situated in Wilkinson county, Miss., and described as three acres in the S. W. corner of sec. 6, T. 1 W., of R. 5 west, bounded on the south by the line of demarcation between the States of Mississippi & Louisiana, on the west & northwest by the Miss. river, old bed, on the north, northeast, & east by other lands of plaintiff, & comprising the storehouse, garden, stable, & lot lately occupied by the defendants, and called the store, stable, lot, &c., of Trager & wife.

And that you make due return of this writ to the next May term of this Court.

Witness the Hon. M. W. Fuller, Chief Justice of the Su-
[SEAL.] preme Court of the United States, and the seal of said Court, at Jackson, this 22d day of Jan'y, 1890.

R. H. WINTER, *Clerk.*

UNITED STATES OF AMERICA, *Southern District of Miss.:*

I hereby specially appoint R. O. Edwards deputy U. S. marshal to execute this writ according to law.

S. S. MATTHEWS,
U. S. Marshal.

Executed the within order on the 24th day of January, 1890.

S. S. MATTHEWS,
U. S. Marshal,
By R. O. EDWARDS,
Special Deputy.

30 I, R. H. Winter, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that the foregoing 29 pages contain a true, full, & perfect transcript of the record and proceedings of the cause lately pending in said court, wherein John F. Jenkins was plaintiff and Louis Trager & Eva A. Trager, his wife, were defendants, No. 3502 (being the cause mentioned in the original citation and writ of error hereto

attached), as fully and completely as it remains of record in my office.

Seal U. S. Circuit Court, 5th Circuit & Southern District of Mississippi.

Given under my hand & the seal of said circuit court, at Jackson, Miss., this 19th day of Feb'y, 1890.

R. H. WINTER, *Clerk.*

31 Nugent & McWillie to R. H. Winter, Dr.

Feb'y 19, '90. To transcript of record in cause of Jno. F. Jenkins *vs.* Louis Trager & Eva A. Trager_ $6 00

Rec'd payment of Nugent & McWillie Feb'y 19, 1890.
R. H. WINTER, *Clk.*

Endorsed on cover: S. Mississippi C. C. U. S. No. 1571. Louis Trager and Eva A. Trager, his wife, plaintiffs in error, *vs.* John F. Jenkins. Filed February 26, 1890.

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JAMES H. McKENNEY
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

LOUIS AND EVA TRAGER
v.
J. F. JENKINS.

No. 1571.

Statement and Brief in reply to motion of Defendant in Error to dismiss or affirm.

I.

The first ground upon which the motion is based is that "the value of the matter in dispute falls far short of $5,000, and, therefore, this Court cannot entertain jurisdiction of the cause."

But however this may be, it is clear that this Court has jurisdiction of the cause under the act of Congress approved February 25, 1889, chapter 236, for a final judgment has been rendered in a circuit court of the United States in which there has been "a question involving the jurisdiction of the court."

This fact does not appear in the record as filed by the defendant in error and printed, because the record was brought up prematurely and in advance of the term to which the writ of error is returnable, viz: the October Term, 1890 (Record, page 11), and, therefore, said record as printed does not contain the bill of exceptions by plaintiffs in error. The fact does appear, however, in an agreed statement by counsel, embracing the charge of the circuit judge to the jury, which statement was filed in this Court by the defendant in error on April —, 1890, and a copy whereof appears in the supplemental record, but for convenience is hereto annexed.

II.

The second ground upon which the motion is based is that "there is no bill of exceptions or anything equivalent by which this court can review the judgment," that "the clerk's certificate is that the transcript includes the whole record," and that the case shows that it is "brought for delay only."

It has already been shown above that the writ of error is not returnable until the October, 1890, term of this Court. It also appears by the agreed statement of counsel, hereto annexed, that plaintiffs in error had until the May, 1890, term of the court below to prepare their bill of exceptions and have the same signed. It is manifest, therefore, that the record is not yet complete, that it is incomplete without any fault of the plaintiffs in error, and that until the complete record, including the bill of exceptions, is before this Court, the Court cannot properly determine whether the case is brought here for the evident purpose of delay.

The agreed statement of counsel shows that this stipulation, allowing until May, 1890, in which to file bill of

exceptions, is now acknowledged, in order that plaintiffs in error may have the advantage of the same on consideration of this motion to dismiss. We therefore submit that the action of defendants in error in causing the transcript in its incomplete form to be filed in this Court in advance of the time given for the preparation and signature by the judge of the bill of exceptions, was in violation of that agreement, and defendants in error should not have the benefit thereof. We insist that under that agreement this Court cannot properly consider the question of jurisdiction until the record is completed by the incorporation of the bill of exceptions and the instructions of the judge to the jury, which will show the errors complained of and upon which the writ of error herein is entirely based.

In asking consideration of the motion to dismiss in advance of the return term, counsel for the motion cite two decisions of this Court: *ex parte* Russell, 13 Wall., 671, and Thomas *v.* Wooldridge, 23 Wall., 288. But it should be observed that both said decisions approve such a practice only "unless some unforeseen inconvenience should arise from the practice." Such inconvenience has arisen in the present case, and the cases cited are therefore inapplicable.

It appears from the charge of the circuit judge hereto annexed, that a most important question is involved in this case, which will doubtless be made still clearer by the bill of exceptions, viz: The extent to which the determination of the boundaries of the States of the Union may be left to the jury in a civil action between individuals. This certainly is not a frivolous question nor is it evident that it is brought to this Court for purposes of delay. On the contrary it would seem to merit the most attentive consideration of the Court, for it touches the rights of the sovereigns composing the Union.

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exceptions, is now acknowledged, in order that plaintiffs in error may have the advantage of the same on consideration of this motion to dismiss. We therefore submit that the action of defendants in error in causing the transcript in its incomplete form to be filed in this Court in advance of the time given for the preparation and signature by the judge of the bill of exceptions, was in violation of that agreement, and defendants in error should not have the benefit thereof. We insist that under that agreement this Court cannot properly consider the question of jurisdiction until the record is completed by the incorporation of the bill of exceptions and the instructions of the judge to the jury, which will show the errors complained of and upon which the writ of error herein is entirely based.

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It appears from the charge of the circuit judge hereto annexed, that a most important question is involved in this case, which will doubtless be made still clearer by the bill of exceptions, viz: The extent to which the determination of the boundaries of the States of the Union may be left to the jury in a civil action between individuals. This certainly is not a frivolous question nor is it evident that it is brought to this Court for purposes of delay. On the contrary it would seem to merit the most attentive consideration of the Court, for it touches the rights of the sovereigns composing the Union.

Moreover, this Court will not dismiss a case on motion merely on the ground that it is brought here for delay only.

Amory *v.* Amory, 1 Otto, 356.

As the jurisdiction of this Court to hear the case on the writ of error is evident, the case cannot be dismissed on the single remaining ground of alleged motive of delay which, moreover, has not been substantiated. Nor can the judgment be affirmed on that ground.

Inasmuch as the motion to which we are responding does not go to the *merits* of the controversy, we will not discuss now the various errors disclosed by the charge of the court below or to be disclosed by the bill of exceptions. When the case comes to argument on the merits of the writ of error we hope to demonstrate that the court left to the jury, in violation of the principle announced in United States *v.* Jackalow, 1 Black, 484, questions which should have been determined by the court as matter of law.

III.

The foregoing, in our opinion, disposes of the points raised by the motion to dismiss or affirm. The merits of the jurisdictional question are not involved in the pending motion, but must be argued and considered later, if the Court shall decide that the motion to dismiss or affirm is not well taken.

But it should be observed that since the pending motion was served, counsel on both sides have agreed (see annexed statement) that the only question to be considered upon this motion shall be whether this Court has jurisdiction of this case irrespective of the amount involved, and that if that shall be decided affirmatively the record already filed by

defendant in error may be supplemented by the bill of exceptions of plaintiffs in error.

As the question presented to the Court is thus narrowed down to the one point of jurisdiction and as this Court clearly has jurisdiction under the act of February 25, 1889, the motion to dismiss or affirm should be denied.

VAN H. MANNING,
DUANE E. FOX,
C. J. & J. S. BOATNER,
for Plaintiffs in Error.

APPENDIX TO BRIEF.

IN THE

Supreme Court of the United States.

LOUIS AND EVA TRAGER,
PLAINTIFFS IN ERROR.

v.

JOHN F. JENKINS, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Mississippi.

On the call of this case in the court below it was stipulated and agreed between the parties that the pleadings should be reformed as the facts were, so as to show the citizenship of the defendants in the State of Louisiana, and the plaintiff in Mississippi, at the institution of the suit, as well as the value of the property in controversy, which was conceded to be over $2,000.00, as shown by the petition filed, and that counsel for the parties should be at liberty to prepare and present for signature by the court a bill of exceptions to any adverse ruling objection to which was noted by the stenographer, as well as to the charge of the

court as given to the jury; and after the verdict was rendered it was agreed that the plaintiff in error should have until the next term of the said circuit court to be held in May, 1890, to prepare and tender their said bill of exceptions. And it is here now agreed that this stipulation shall be filed with the record in said cause and made part thereof in order that the plaintiffs in error may have the advantage of the same on the consideration of the motion to dismiss the writ of error. It is further agreed and understood that the question at issue between the parties is fully presented in the charge of the court, copy of which is hereto attached; and that if the said Supreme Court shall be of opinion that it has the jurisdiction in this controversy to review the proceedings had in the said circuit court touching the question as to whether the lands sued for were in the State of Mississippi or Louisiana, without reference to the amount in controversy or the value of the property, the motion to dismiss shall be overruled, but otherwise sustained. And it is further agreed and understood that if the said motion be overruled, the record filed by defendant in error may be supplemented by bill of exceptions to be agreed upon on or before the 1st day of September, A. D. 1890.

CALHOON & GREEN,
For Defs. Trager and Wife.

NUGENT & McWILLIE,

W. HALLETT PHILLIPS,
For Plff. John F. Jenkins.

VAN H. MANNING,

DUANE E. FOX,

C. J. & J. S. BOATNER,
For Defs. Trager and Wife.

JENKINS
v.
TRAGER.

Instructions to the Jury.

The plaintiff in his declaration alleges that he is the legal owner of the land and improvements thereon, described in his declaration, and is entitled to the possession thereof, with the rents and profits thereon since the 21st day of May, 1882, when, it is alleged, the defendant unlawfully deprived him of the possession of the same. To this declaration the defendant pleaded not guilty, which throws upon the plaintiff the burthen of proving to your reasonable satisfaction the truth of the allegations made in the declaration.

It is admitted that the defendant is, and was at the time the suit was commenced, in possession of the land described in the declaration, though it is insisted that it is in Louisiana. The question to be decided by you is to ascertain, from the proof, whether or not the plaintiff was, at the time he brought his suit, the legal owner of the land and improvements thereon as described in his declaration. The certificate of the Register of the Land Office, given to Richard Collins, dated Jan. 1, 1839, is evidence that Collins had entered 480 acres of land lying on the east side of the Mississippi river, but does not describe the land so that it could be found; and if there was no other evidence in the case, would be insufficient to sustain the action. But the deed of Richard Collins and wife to William Collins evidently was intended to embrace the same land, and describes it as being in Wilkinson county, Mississippi, bounded on the west by the Mississippi river, and on the south by the line of demarcation between the

United States and the Spanish Territory, being the same line now dividing the States of Mississippi and Louisiana. This line of demarcation, as shown by the evidence before you, was established by Andrew Ellicott, Commissioner on the part of the United States, and William Dunbar, Commissioner on the part of Spain, in 1798, and has ever since been recognized by the States of Mississippi and Louisiana as the dividing line between them. It is conceded that the land described in the declaration is within the boundary set out in this deed, if it lies north of said demarcation line; and that, if it lies south of this line, it is not within the calls of any of the deeds read in evidence to establish the plaintiff's title. The deeds and transcripts from the records of the probate courts of Adams and Wilkinson counties, read in evidence, establish the following facts: That William Collins conveyed the lands purchased from Richard Collins and wife to John Wall, and that the heirs-at-law of John Wall conveyed whatever of title John Wall had in the same lands to John T. Carmichael; that John T. Carmichael died intestate, leaving his sister, Phœbe Carmichael, his only heir-at-law, to whom the land in controversy together with other lands descended; and that Phœbe Carmichael on the 3d day of August, 1838, conveyed the land thus cast upon her by descent to John C. Jenkins, the father of plaintiff. The uncontradicted parol evidence establishes the fact that said John C. Jenkins, soon after his purchase, went into the actual possession of the lands so purchased; that he cleared and cultivated a portion of them and continued up to his death in such possession; that his executors, under his will, continued in the possession thereof until the 28th of February, 1867, when they were partitioned and the southwest corner of the tract embracing the land conveyed by Richard Collins and wife to William Collins, and which through mesne

conveyances were vested in John C. Jenkins, was allotted to the plaintiff, who immediately went into the actual possession of the same, and so continued up to the bringing of this suit. This actual occupation, therefore, covered a period of about fifty years. From this possession taken under the deed from Phœbe Carmichael, and so long continued, it will be presumed that a patent was issued by the United States to the original purchaser of the land, and that John C. Jenkins in his lifetime had, and the plaintiff, his son, has, a valid legal title to the land described in the declaration, unless he be barred, as to that portion of it now in controversy, by the adverse possession of the defendant, or Mrs. Cheatham, under whom he claims title. Such adverse possession, however, must be continual and unbroken for the space of ten years next before the commencement of this suit to be availed of by the defendant. The possession of a part of the lands conveyed to the plaintiff and his ancestor is a possession of all the lands included in the conveyance under which such possession was taken; but, as to any part of the land not described in the deeds relied on, the adverse possession can only extend to the portion in actual occupation adversely for ten years without any break therein. This rule applies to the adverse possession claimed on both sides.

The first and most important question to be ascertained by you under the proof is, as to where the original line of demarcation, fixed by the Commissioners Ellicott and Dunbar is, as that must fix the boundary, not only between the States of Mississippi and Louisiana, but between the land claimed by the parties to this suit, both asserting that line as their line and only boundary. The 31st parallel north latitude was agreed to be the line between the United States and Spain, and subsequently between the

States of Mississippi and Louisiana; and it was further agreed that the Commissioners named should determine where that parallel was, and fix and mark its actual location. When that was done the line of demarcation as fixed must so remain to this day, whether there was any mistake made in determining, running, and marking it or not; and no subsequent agreement or survey can change and alter it, nor can the fact that the one State or the other exercised jurisdiction of any kind on the opposite side of the line, or that those residing on the one side, or the other, supposed they were living in one State, when they were in fact residing in the other State, be evidence of the place where the line of demarcation is, if the proof shows to your satisfaction that the Commissioners actually ran and marked it at a different point.

The surveys and other written evidence upon the part of the plaintiff place the said line just south of the storehouse and ground occupied by defendant, and is *prima facie* proof that this is the line fixed by the Commissioners; but it is insisted, upon the part of the defendant, that the evidence introduced by him shows that this is not the true line, and that the line run and marked by the said Commissioners, properly retraced, is north of the said line, and north of the land in controversy in this suit. Whether this is so or not, you must determine from all the evidence in the cause, after carefully considering and weighing it.

It is insisted, upon the part of the plaintiff, that, before the line was retraced by the engineer Babbitt, it was a matter of dispute and doubtful where the line of demarcation was fixed and marked by the Commissioners Ellicott and Dunbar, and that he and the defendant mutually agreed that said Babbitt should find out, as best he could, where the said line was, and rerun and remark it, and that when

so rerun and remarked, it should be the boundary line between them, no matter what the result should be, and that, after the line was run and marked by said Babbitt and found to be south of the land in controversy, defendant agreed to remove the houses and all improvements, and that plaintiff was not informed he did not intend to do so, or to stand by the agreement, until just before this action was commenced. This agreement is denied by the defendant. You will determine from the testimony whether it it was made or not. Where the line separating the lands of two persons is *unknown*, they may, by parol, agree and fix a line between them; but it must be mutually and unconditionally agreed to, and acted upon by them. If, in this case, you shall find from the proof that the line run by Babbitt was mutually agreed upon after it was determined and marked, and that the defendant agreed to remove his buildings within some future time, but that he changed his purpose and did not notify the plaintiff of such change, and that the plaintiff relied upon the agreement and promise, the defendant would be estopped from repudiating such agreement. As before stated, however, the agreement must have been mutually entered into between the parties and acted upon by them, or the defendant must have entered into such agreement as would have induced the plaintiff to believe that the defendant conceded to him the right to the possession of the premises, and was only occupying them by the sufferance of the plaintiff. If this was the fact, then the agreement would be valid and binding and would fix the boundary line between the parties to this suit, but could not affect in any way the line of demarcation between the states of Mississippi and Louisiana fixed and marked by the Commissioners Ellicott and Dunbar in 1798, even if that line was run by said commissioners north of the lands in controversy. If you believe this to be so, your verdict

will be for the defendant, as this court would have no jurisdiction to try the issue between the parties, the premises being in another State, while the agreement might be binding between the parties. It is claimed, on the part of the defendant, that although the land in controversy lies north of the real demarcation line between said States, and is in the State of Mississippi, yet that Mrs. Cheatham under whom he holds, before his purchase, and he since such purchase, have held continuous adverse possession of the land in controversy for more than ten years before this action was commenced, and, therefore, that the plaintiff is barred of his recovery.

The conveyance from Mrs. Cheatham to plaintiff specifies the said demarcation line as the northern boundary of the land conveyed, and any possession of the land had by her, to be availed of by defendant, can only be extended to that line. Any possession which Mrs. Cheatham may have had beyond that line, cannot be availed of by defendant as it is not embraced in his deed, and is not shown to be claimed by Mrs. Cheatham so as to show an outstanding title in her.

If after weighing and considering the proof on both sides you shall find the issues in favor of the plaintiff, you will ascertain the value of the rents of the land and of the improvements described in the declaration since the 21st day of May, 1882, up to the present time, the value of the improvements put thereon by the defendant and the value of the land without the improvements; and you will deduct the amount of the rents from the value of the improvements, and state the same in your verdict, or the balance of the rents over the improvements, as the case may be.

In weighing the evidence on all these points, you will consider all that has been introduced on both sides, in-

cluding the testimony of the plaintiff and defendant, who are competent witnesses, the interest each has in the controversy only going to his credibility. If you shall find conflicts in the evidence you will reconcile the differences if you can; but if you cannot, you will determine which statements are most probably true. If you shall find from the proof that the plaintiff is not the legal owner and entitled to the possession of the land under the instructions given, your verdict will be simply for the defendant.

Supreme Court of the United States.

OCTOBER TERM, 1889.

TRAGER
vs. No. 1571.
JENKINS.

Reply of W. Hallett Phillips on Motion to Dismiss.

It is admitted that the amount involved is not sufficient, but it is claimed that this court has jurisdiction irrespective of the value of the matter in dispute, by the act of February 25, 1889, because there is in the case "a question involving the jurisdiction of the court below."

Opposing counsel content themselves with stating that this question appears in the agreed statement embracing the charge of the circuit court. They fail to point out the question more specifically, unless indeed their reference to the question of the boundary line between Mississippi and Louisiana as involved is intended as specifying the question involving the jurisdiction of the court below.

The nature of the controversy has nothing to do, however, with the jurisdiction of the Court below to try it.

The use of the act of 1889, is an afterthought, and we submit such act lends no countenance to the writ of error.

It is agreed by the parties that the question at issue is fully presented in the charge of the Court.

That question was whether the lands sued for were north or south of the boundary line. The controversy was to the true location of the line. There was no question of jurisdiction raised, and it cannot be pretended that the Court below was not competent to determine to try the question as to the location of the boundary line. The only other question related to the agreement of the parties as to the boundary line between them, and a question of adverse possession.

This court will hardly deem themselves called on to construe the act of 1889, in the present case.

This is, we believe, the first time it is claimed that a writ of error is brought under its provisions.

It would seem that the true construction is that not only must a question of jurisdiction of the court below be involved, but such question to be reviewed must be decided *against the party seeking the review*, and must be involved in the judgment or decree.

The act provides "that in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United State, in which there shall have been a question involving the jurisdiction of the court, the party *against whom the judgment or decree* is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to *review such judgment or decree* without reference to the amount of the same; but in cases where the judgment or decree does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record, except such question of jurisdiction." 25 Stat., 693.

Any construction except that indicated would flood this Court with cases under the pretense that questions of jurisdiction were *involved*, as to give jurisdiction here it would only be necessary to raise a question of the jurisdiction of the trial court, however frivolous or irrelevant to the judgment.

As the parties have agreed that in case this court should hold that it has jurisdiction the plaintiff in error may supplement the record by a bill of exceptions, the motion to affirm may beconsidered as withdrawn. The motion to dismiss, we submit, should be granted.

W. HALLETT PHILLIPS,
for Motion.

Supreme Court of the United States.

OCTOBER TERM, 1889.

LOUIS TRAGER AND WIFE
vs.
J. F. JENKINS.
No. 1571.

Motion to Dismiss or Affirm.

The defendant in error moves the court to dismiss the writ of error in the above entitled case, on the ground that the amount involved is not sufficient to confer jurisdiction. He unites therewith a motion to affirm on the ground that, even if the court has jurisdiction, it is manifest that the writ is sued out for delay only.

W. HALLETT PHILLIPS,
for Motion.

Take notice that the above motion will be submitted three weeks after service hereof.

W. HALLETT PHILLIPS.

To Counsel for plaintiff in error.

Brief of W. Hallett Phillips for Motion.

(1.) The suit below was ejectment brought by Jenkins against Trager, his wife and Wolf to recover three acres of land in their possession on which there were certain improvements erected by defendants. Damages to the amount of one hundred dollars for wrongful detention were demanded, and "also the sum of eight hundred dollars for the use and occupation of the land, being at the rate of $100 a year."

There was a plea of not guilty, and the suit was dismissed as to Wolf, who was a tenant of the defendants (R., 5.)

By stipulation it was agreed that the claim for improvements was for $1,440 and taxes $200 (R., 6)

There was a verdict in favor of plaintiff as follows:

"We the jury find for the plaintiff and assess the rental value of the lands and improvements at the sum of six hundred and sixty dollars, and we assess the value of the improvements at the sum of six hundred and fifty dollars, making a difference of ten dollars, due the plaintiff by the defendant; and we assess the value of the lands without the improvements at the sum of thirteen hundred and fifty dollars."

Upon this verdict a judgment was rendered that plaintiff recover the property sued for and the sum of ten dollars being the excess of rents over the value of improvements; a writ of habere facias was ordered to put the plaintiff in possession and executed. (R. 6).

Subsequently, on defendants furnishing a supersedeas bond and perfecting a writ of error, the writ of possession was vacated and the property restored to possession of defendants. (R. 12).

It is clear that the value of the matter in dispute falls far short of $5,000, and therefore this court cannot entertain jurisdiction of the cause.

The verdict of the jury establishing the value of the premises must be taken as conclusive.

The code of Mississippi permits the defendant in ejectment to set off improvements as against the claim for mesne profits and damages, and provides, "that the jury shall find the actual cost value of such improvements, the valueof the mesne profits and damages, and also the actual cash value of the land without the improvements," § 1557, Rev. Code of Miss.

If we should add to the value of the land the whole amount claimed by defendants, discarding the claim of plaintiff, still the amount involved would not be sufficient.

The writ of error must therefore be dismissed.

(2.) If the jurisdiction could be sustained, the judgment would have to be affirmed.

There is no bill of exceptions or anything equivalent, by which this court can review the judgment.

The clerk's certificate is that the transcript includes the whole record.

The case shows so plainly it is brought for delay only, that the defendant in error has docketed it here and in advance of the term to which the writ of error is returnable, asks the court to take action thereon.

This practice has the approval of the court "as likely to prevent great delays and expense and further the ends of justice."

Ex parte Russell, 13 Wall., 671.
Thomas v. *Woolridge*, 23 Wall., 288.

The writ of error should be dismissed or the judgment affirmed.

W. HALLETT PHILLIPS,
For Motion.

IN THE SUPREME COURT OF THE UNITED STATES.

LOUIS & EVA TRAGER, Plaintiffs in Error,
v.
JOHN F. JENKINS, Defendant in Error.

Error to the circuit court of the United States for the southern district of Mississippi.

On the call of this case in the court below it was stipulated and agreed between the parties that the pleadings should be reformed as the facts were, so as to show the citizenship of the defendants in the State of Louisiana and the plaintiff in Mississippi at the institution of the suit, as well as the value of the property in controversy, which was conceded to be over $2,000.00, as shown by the petition filed, and that counsel for the parties should be at liberty to prepare and present for signature by the court a bill of exceptions to any adverse ruling, objection to which was noted by the stenographer, as well as to the charge of the court as given to the jury; and after the verdict was rendered it was agreed that the plaintiff in error should have until the next term of the said circuit court, to be held in May, 1890, to prepare and tender their said bill of exceptions; and it is here now agreed that this stipulation shall be filed with the record in said cause and made part thereof, in order that the plaintiffs in error may have the advantage of the same on the consideration of the motion to dismiss the writ of error. It is further agreed and understood that the question at issue between the parties is fully presented in the charge of the court, copy of which is hereto attached, and that if the said Supreme Court shall be of opinion that it has the jurisdiction in this controversy to review the proceedings had in the said circuit court touching the question as to whether the lands sued for were in the State of Mississippi or Louisiana, without reference to the amount in controversy or the value of the property, the motion to dismiss shall be overruled, but otherwise sustained; and it is further agreed and understood that if the said motion be overruled the record filed by defendant in error may be supplemented by bill of exceptions, to be agreed upon on or before the 1st day of September, A. D. 1890.

CALHOUN & GREEN,
For Defendants, Trager & Wife.
NUGENT & McWILLIE,
For Plaintiff, Jno. F. Jenkins.
W. HALLETT PHILLIPS,
For Defendant in Error.
VAN H. MANNING,
DUANE E. FOX,
C. J. & J. S. BOATNER,
For Plaintiffs in Error.

JENKINS v. TRAGER. } Instructions to the Jury.

The plaintiff in his declaration alleges that he is the legal owner of the land and improvements thereon described in his declaration and is entitled to the possession thereof, with the rents and profits thereon, since the 21 day of May, 1882, when, it is alleged, the defendant unlawfully deprived him of the possession of the same. To this declaration the defendant pleaded not guilty, which throws upon the plaintiff the burthen of proving to your reasonable satisfaction the truth of the allegations made in the declaration.

It is admitted that the defendant is and was at the time the suit was commenced in possession of the land described in the declaration, though it is insisted that it is in Louisiana. The question to be decided by you is to ascertain from the proof whether or not the plaintiff was at the time he brought his suit the legal owner of the land and improvements thereon as described in his declaration. The certificate of the register of the land office given to Richard Collins, dated Jan. 1, 1839, is evidence that Collins had entered 480 acres of land lying on the east side of the Mississippi river, but does not describe the land so that it could be found, and, if there was no other evidence in the case, would be insufficient to sustain the action; but the deed of Richard Collins and wife to William Collins evidently was intended to embrace the same land, and describes it as being in Wilkinson county, Mississippi, bounded on the west by the Mississippi river and on the south by the line of demarcation between the United States and the Spanish territory, being the same line now dividing the States of Mississippi and Louisiana. This line of demarcation, as shown by the evidence before you, was established by Andrew Ellicott, commissioner on the part of the United States, and William Dunbar, commissioner on the part of Spain, in 1798, and has ever since been recognized by the States of Mississippi and Louisiana as the dividing line between them. It is conceded that the land described in the declaration is within the boundary set out in this deed if it lies north of said demarcation line, and that if it lies south of this line it is not within the calls of any of the deeds read in evidence to establish the plaintiff's title. The deeds and transcripts from the records of the probate courts of Adams and Wilkinson counties, read in evidence, establish the following facts: That William Collins conveyed the lands purchased from Richard Collins and wife to John Wall, and that the heirs-at-law of John Wall conveyed whatever of title John Wall had in the same lands to John T. Carmichael; that John T. Carmichael died intestate, leaving his sister, Phœbe Carmichael, his only heir-at-law, to whom the land in controversy, together with other lands, descended, and that Phœbe Carmichael, on the 3rd day of August, 1838, conveyed the land thus cast upon her by descent to John C. Jenkins, the father of plaintiff. The uncontradicted parol evidence establishes the fact that said John C. Jenkins, soon after his purchase, went into the actual possession of the lands so purchased;

that he cleared and cultivated a portion of them and continued up to his death in such possession; that his executors under his will continued in the possession thereof until the 28th of February, 1867, when they were partitioned, and the southwest corner of the tract, embracing the land conveyed by Richard Collins and wife to William Collins, and which through mesne conveyances were vested in John C. Jenkins, was allotted to the plaintiff, who immediately went into the actual possession of the same and so continued up to the bringing of this suit. This actual occupation, therefore, covered a period of about fifty years. From this possession, taken under the deed from Phœbe Carmichael and so long continued, it will be presumed that a patent was issued by the United States to the original purchaser of the land, and that John C. Jenkins is his lifetime had and the plaintiff, his son, has a valid legal title to the land described in the declaration unless he be barred, as to that portion of it now in controversy, by the adverse possession of the defendant or Mrs. Cheatham, under whom he claims title. Such adverse possession, however, must be continued and unbroken for the space of ten years next before the commencement of this suit to be availed of by the defendant. The possession of a part of the lands conveyed to the plaintiff and his ancestor is a possession of all the lands included in the conveyance under which such possession was taken; but, as to any part of the land not described in the deeds relied on, the adverse possession can only extend to the portion in actual occupation adversely for ten years without any break therein. This rule applies to the adverse possession claimed on both sides.

The first and most important question to be ascertained by you under the proof is as to where the original line of demarcation fixed by the commissioners, Ellicott and Dunbar, is, as that must fix the boundary, not only between the States of Mississippi and Louisiana, but between the land claimed by the parties to this suit, both asserting that line as their line and only boundary.

The 31st parallel north latitude was agreed to be the line between the United States and Spain, and subsequently between the States of Mississippi and Louisiana; and it was further agreed that the commissioners named should determine where that parallel was and fix and mark its actual location. When that was done the line of demarcation as fixed must so remain to this day, whether there was any mistake made in determining, running, and marking it or not; and no subsequent agreement or survey can change and alter it, nor can the fact that the one State or the other exercised jurisdiction of any kind on the opposite side of the line, or that those residing on the one side or the other supposed they were living in one State when they were in fact residing in the other State, be evidence of the place where the line of demarcation is, if the proof shows to your satisfaction that the commissioners actually ran and marked it at a different point.

The surveys and other written evidence upon the part of the plaintiff place the said line just south of the storehouse and ground occupied by defendant and is *prima facie* proof that this

is the line fixed by the commissioners; but it is insisted upon the part of the defendant that the evidence introduced by him shows that this is not the true line, and that the line run and marked by the said commissioners, properly retraced, is north of the said line and north of the land in controversy in this suit. Whether this is so or not you must determine from all the evidence in the cause, after carefully considering and weighing it.

It is insisted upon the part of the plaintiff that before the line was retraced by the engineer, Babbitt, it was a matter of dispute and doubtful where the line of demarcation was fixed and marked by the commissioners, Ellicott and Dunbar, and that he and the defendant mutually agreed that said Babbitt should find out as best he could where the said line was and rerun and remark it, and that when so rerun and remarked it should be the boundary line between them, no matter what the result should be, and that after the line was run and marked by said Babbitt and found to be south of the land in controversy defendant agreed to remove the houses and all improvements, and that plaintiff was not informed he did not intend to do so or to stand by the agreement until just before this action was commenced. This agreement is denied by the defendant. You will determine from the testimony whether it was made or not. Where the line separating the lands of two persons is unknown they may by parol agree and fix a line between them, but it must be mutually and unconditionally agreed to and acted upon by them. If in this case you shall find from the proof that the line run by Babbitt was mutually agreed upon after it was determined and marked, and that the defendant agreed to remove his buildings within some future time, but that he changed his purpose and did not notify the plaintiff of such change, and that the plaintiff relied upon the agreement and promise, the defendant would be estopped from repudiating such agreement. As before stated, however, the agreement must have been mutually entered into between the parties and acted upon by them or the defendant must have entered into such agreement as would have induced the plaintiff to believe that the defendant conceded to him the right to the possession of the premises and was only occupying them by the sufferance of the plaintiff. If this was the fact, then the agreement would be valid and binding and would fix the boundary line between the parties to this suit, but could not affect in any way the line of demarcation between the States of Mississippi and Louisiana fixed and marked by the commissioners, Ellicott and Dunbar, in 1798, even if that line was run by said commissioners north of the lands in controversy. If you believe this to be so, your verdict will be for the defendant, as this court would have no jurisdiction to try the issues between the parties, the premises being in another State, while the agreement might be binding between the parties. It is claimed on the part of the defendant that although the land in controversy lies north of the real demarcation line between said States and is in the State of Mississippi, yet that Mrs. Cheatham, under whom he holds, before his purchase, and he, since such purchase, have held continuous adverse possession of the land in controversy for more than ten years before this

action was commenced, and therefore that the plaintiff is barred of his recovery.

The conveyance from Mrs. Cheatham to plaintiff specifies the said demarcation line as the northern boundary of the land conveyed, and any possession of the land had by her to be availed of by defendant can only be extended to that line. Any possession which Mrs. Cheatham may have had beyond that line cannot be availed of by defendant, as it is not embraced in his deed and is not shown to be claimed by Mrs. Cheatham, so as to show an outstanding title in her.

If, after weighing and considering the proof on both sides, you shall find the issue in favor of the plaintiff, you will ascertain the value of the rents of the land and of the improvements described in the declaration since the 21st day of May, 1882, up to the present time, the value of the improvements put thereon by the defendant, and the value of the land without the improvements, and you will deduct the amount of the rents from the value of the improvements, and state the same in your verdict, or the balance of the rents over the improvements, as the case may be.

In weighing the evidence on all these points you will consider all that has been introduced on both sides, including the testimony of the plaintiff and defendant, who are competent witnesses, the interest each has in the controversy only going to his credibility. If you shall find conflicts in the evidence you will reconcile the differences if you can; but, if you cannot, you will determine which statements are most probably true. If you shall find from the proof that the plaintiff is not the legal owner and entitled to the possession of the land under the instructions given, your verdict will be simply for the defendant.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 1571. Louis Trager and wife, pl'ffs in error, *vs.* John F. Jenkins. Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Apr. 17, 1890. James H. McKenney, clerk.